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In the Supreme Court of the United States

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IN THE MATTER OF THE PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR A WRIT OF PROHIBITION AND FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE JOSEPH BUFFINGTON, THE HONORABLE J. WARREN DAVIS, AND THE HONORABLE J. WHITAKER THOMPSON, CIRCUIT JUDGES OF THE THIRD JUDICIAL CIRCUIT, AND THE OTHER JUDGES AND OFFICERS OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF PROHIBITION AND MANDAMUS

And now come Robert H. Jackson, Solicitor General of the United States, and Charles Fahy, General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board, and move:

1. For leave to file the petition for a writ of prohibition and for a writ of mandamus hereto annexed, and

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2. That a rule be entered and issued directing the Honorable Joseph Buffington, the Honorable J. Warren Davis, and the Honorable J. Whitaker Thompson, Circuit Judges of the Third Judicial Circuit, and the other judges and officers of the United States Circuit Court of Appeals for the Third Circuit, to show cause why a writ of prohibition and a writ of mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why the National Labor Relations Board should not have such other and further relief therein as may be just.

ROBERT H. JACKSON,
Solicitor General of the United States.
CHARLES FAHY,
General Counsel,
National Labor Relations Board.

MAY 1938.

In the Supreme Court of the United States

OCTOBER TERM, 1937

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IN THE MATTER OF THE PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR A WRIT OF PROHIBITION AND A WRIT OF MANDAMUS AGAINST THE HONORABLE JOSEPH BUFFINGTON, THE HONORABLE J. WARREN DAVIS, THE HONORABLE J. WHITAKER THOMPSON, CIRCUIT JUDGES OF THE THIRD JUDICIAL CIRCUIT, AND THE OTHER JUDGES AND OFFICERS OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD FOR WRITS OF PROHIBITION AND MANDAMUS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the National Labor Relations Board, by Robert H. Jackson, Solicitor General of the United States, and Charles Fahy, General Counsel of the Board, and by leave of the Court first had and obtained, files this, its petition, for a writ of prohibition and for a writ of mandamus against

the Honorable Joseph Buffington, the Honorable J. Warren Davis, the Honorable J. Whitaker Thompson, Circuit Judges of the Third Judicial Circuit, and the other Judges and officers of the United States Circuit Court of Appeals for the Third Circuit, and respectfully represents:

1. Pursuant to authority conferred by the Act of July 5, 1935, 49 Stat. 449, the National Labor Relations Board (hereinafter called the Board) on April 8, 1938, issued an order in a cause before the Board entitled *In the Matter of Republic Steel Corporation—Case No. C-184*, directing the Republic Steel Corporation (hereinafter called the Corporation) to cease and desist from certain unfair labor practices and to take certain affirmative action found by the Board to be necessary to effectuate the policies of the National Labor Relations Act.

2. On April 18, 1938, the Corporation filed in the United States Circuit Court of Appeals for the Third Circuit its petition, entitled *Republic Steel Corporation* v. *National Labor Relations Board*, March Term, 1938, No. 6764, for review of the aforesaid order of the Board. The Corporation in its petition alleged *inter alia* that the order of the Board denied to the Corporation due process of law in violation of the Fifth Amendment to the Constitution of the United States for the reason that the order had been entered without affording the Corporation an opportunity to present its case

by argument, oral or upon brief. The Corporation alleged further that it had not been given a hearing in accordance with the usual and accepted rules of legal procedure and the law of the land.

3. Section 29 of Article II of the Rules and Regulations of the Board—Series 1, as amended, provides that any party to a proceeding shall be entitled to a reasonable period at the close of the hearing for oral argument before the trial examiner and shall be entitled with the permission of the trial examiner to file briefs. The Corporation, in the proceeding against it above-mentioned, did not avail itself of its right to argue orally before the trial examiner nor did it request permission of the trial examiner to file briefs. Sections 36 and 38 of Article II of the aforesaid Rules and Regulations provide that the Board may decide a case with or without allowing the parties an opportunity to present oral argument before the Board itself or to submit briefs to the Board. It is the practice of the Board to grant leave to submit briefs to it or to make oral argument before it whenever requested to do so by parties to proceedings before it; but the Rules and Regulations do not expressly state that such a request may be made or that the request, if made, will be granted. No such request was made by the Corporation in the proceeding above-mentioned, and no brief was received or oral argument heard by the Board on behalf of the Corporation before the entry of the order of April 8, 1938.

4. Section 32 of Article II of the Rules and Regulations of the Board—Series 1, as amended, provides that "cases which are initiated by the filing of charges before a Regional Director and which are not thereafter transferred before the Board in Washington, the case shall be heard by a trial examiner who shall at the conclusion of the hearing render an intermediate report containing findings of fact and recommendations as to the disposition of the case which shall be served upon the parties; and Section 34 of the same Article provides that in such a case the parties shall be entitled to take exceptions to the intermediate report. Sections 37 and 38 of Article II provide that in cases which are initiated by charges filed with the Board in Washington or which are transferred before the Board in Washington, the Board may direct the trial examiner to prepare an intermediate report, but the rules do not require that an intermediate report be prepared or served upon the parties, nor do they require that the Board should serve upon the parties its own proposed findings of fact and conclusions of law. The proceeding against the Corporation, above-mentioned, was initiated by charges filed with the Board pursuant to leave from the Board. The Board did not direct the trial examiner to prepare an intermediate report, and no such report was prepared or served upon the parties; nor did the Board serve upon the parties its own proposed findings of fact and conclusions of law before the entry of its order of April 8, 1938.

5. Subsequent to April 25, 1938, the Board instituted the practice of specifically calling the attention of the parties in all proceedings before it to their right to submit briefs to the Board and upon request to be heard by the Board in oral argument. The Board also determined that in cases thereafter decided which had been initiated or transferred before it (unless reasons to the contrary should appear in particular cases) an intermediate report should be prepared by a trial examiner and served upon the parties or, in the alternative, that proposed findings of fact and conclusions of law should be prepared by the Board and served upon the parties, with express notice to the parties of their right to take exceptions to the intermediate report or proposed findings and upon request to be heard by the Board in argument, oral or upon brief, upon such exceptions. With respect to certain such cases already decided, in which complaint had been made of the absence of an intermediate report or proposed findings, or of lack of argument, written or oral, the Board, although advised that its orders therein were in accordance with law, nevertheless determined to vacate the orders, to restore the cases to its docket, and to reconsider and redetermine the cases after giving full opportunities to the parties to except to proposed findings of fact and conclusions of law and after giving them express notice of their right to submit briefs to the Board and to be heard by the Board upon request in oral argument.

6. Among the cases affected by the last stated determination of the Board was *In the Matter of Republic Steel Corporation—Case No. C–184,* above referred to. On April 30, 1938, at a hearing upon a motion by the Corporation for a stay of the order of the Board in the said case, counsel for the Board, in the presence of counsel for the Corporation, advised the United States Circuit Court of Appeals for the Third Circuit that the Board was considering vacating its order in the said case. On May 3, 1938, counsel for the Board advised the Corporation, by telegram addressed to its counsel, Joseph W. Henderson, that the Board had definitely decided to vacate its said order, and that on May 4, 1938, the said order would be so vacated.[1]

7. Paragraph (d) of Section 10 of the Act of June 5, 1935, 49 Stat. 454, provides:

> Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside,

[1] Receipt of this telegram was denied by counsel for the Corporation at a hearing held before the United States Circuit Court of Appeals for the Third Circuit on May 9, 1938. The Board is advised, however, that the telegram was delivered by a messenger for the Western Union Telegraph Company to a secretary or stenographer on duty in the office of counsel for the Corporation shortly after 1 p. m. on the afternoon of May 3, 1938. Counsel for the Corporation admitted having received on May 4, 1938, a copy of the telegram addressed to the judges of said court, referred to in Paragraph 9 hereof.

in whole or in part, any finding or order made or issued by it.

No transcript of the record in the aforesaid case of *In the Matter of Republic Steel Corporation, Case No. C–184*, has yet been filed in the United States Circuit Court of Appeals for the Third Circuit, or in any other court.

8. On May 3, 1938, upon application made on behalf of the Corporation and without notice to the Board or opportunity to be heard, the United States Circuit Court of Appeals for the Third Circuit (Circuit Judges Buffington, Davis, and Thompson sitting) issued a rule returnable on May 13, 1938, requiring the Board to show cause why it should not file in the said court a certified transcript of the record in the proceedings before the Board in *In the Matter of Republic Steel Corporation—Case No. C–184*, and issued an order restraining the Board from taking any steps or proceedings whatsoever in the said case until the return day of the rule. A certified copy of the said rule and temporary restraining order is attached hereto.

9. On May 4, 1938, the Board by telegram from its counsel of record advised the judges of the United States Circuit Court of Appeals for the Third Circuit that the Board would have vacated its order against the Corporation on that day except for the restraining order issued by the said court on the previous day, and suggested to the

court that in view of the provisions of Section 10 (d) of the Act the restraining order was improvidently issued and should forthwith be vacated. On May 5, 1938, counsel for the Board presented to the senior circuit judge of the said court formal application for the vacation of said restraining order, and requested that counsel for respondent be notified and that immediate action be taken thereon. The senior circuit judge advised counsel for the Board that the court would hear a motion by the Board for the vacation of said restraining order on Monday, May 9, 1938. On May 6, 1938, the Board forwarded to the clerk of said court its motion for the vacation of said restraining order, and gave notice to counsel of record for the Corporation of its intention to present the motion for action at the time and place fixed by the court. On May 9, 1938, the Corporation appeared and filed its own motion for an order compelling the Board forthwith to file the record in the proceedings before it. This motion and the motion of the Board to vacate the restraining order were argued before the court. The court, specifically declining to make immediate disposition of the matter as requested by the Board, took both motions under advisement.

10. On May 13, 1938, the Board filed in the United States Circuit Court of Appeals for the Third Circuit its response to the rule of the said court, issued on May 3, 1938, to show cause why it should not file a certified transcript of the record

in the proceedings before the Board in *In the Matter of Republic Steel Corporation—Case No. C–184*. The Board showed to the court that the record in the said case was incomplete for the reason that the Board had determined on May 3, 1938, to vacate its order therein and to restore the case to its docket for further proceedings, and had only been prevented from so doing by the restraining order issued by the court on the same day. The Board further showed to the court that the court was without jurisdiction to issue its restraining order of May 3, 1938, for the reason that the Board was empowered by Section 10 (d) of the Act of July 5, 1935, to vacate its order in the said case at any time before the record in the case was filed in a court, and the record had not yet been so filed. The Board further showed to the court that the court was likewise without jurisdiction, while continuing the restraining order in effect and so unlawfully preventing the Board from vacating its said order, to compel the Board to file in the court a certified copy of the transcript of the record in the case for the reason that such action would finally deprive the Board of its express statutory power to vacate its order without affording it the opportunity intended by the statute to exercise the said power. Nevertheless, on the same day, the court issued its order making absolute the aforesaid rule of May 3, 1938, requiring the Board to file in the said court a certified transcript of the record in the proceedings before the Board in *In*

the Matter of Republic Steel Corporation—Case No. C–184, and enjoined the Board from taking any further steps or proceedings whatsoever in the said case until the said record is so filed. A copy of the said order is attached hereto. The court denied from the bench the application of the Board for a stay of the affirmative provisions of the said order pending further proceedings in this Court.

11. By reason of the provision of Section 10 (d) of the Act of July 5, 1935, above set forth, the Board is empowered to vacate its order in *In the Matter of Republic Steel Corporation—Case No. C–184* at any time before the transcript of record in the said case shall have been filed in a court. Under the terms of the Act the United States Circuit Court of Appeals for the Third Circuit was and is without jurisdiction to restrain the Board from vacating such order before a transcript of the record in the case shall have been so filed, and the said court was and is without jurisdiction, while unlawfully restraining the Board from vacating its order, to compel the board to certify to the court the transcript of the record in the said case.

12. If pursuant to the order of the United States Circuit Court of Appeals for the Third Circuit the Board be compelled forthwith to file in the said court a certified transcript of the record in *In the Matter of Republic Steel Corporation—Case No. C–184* prior to the disposition by this Court of this petition, it will be uncertain whether upon such filing the said court will thereby acquire jurisdic-

tion to proceed to a determination of the petition of the Corporation to set aside the order made by the Board on April 8, 1938, and it will be likewise uncertain whether the petition of the Board herein for writs of mandamus and prohibition will thereby be rendered moot.

WHEREFORE, the said National Labor Relations Board, the aid of this honorable Court respectfully requesting, prays:

1. That a writ of mandamus be issued out of this honorable Court directing and commanding the Honorable Joseph Buffington, the Honorable J. Warren Davis, the Honorable J. Whitaker Thompson, Circuit Judges of the Third Judicial Circuit, and the other judges and officers of the United States Circuit Court of Appeals for the Third Circuit, to vacate the order of the said court issued on May 13, 1938, restraining the National Labor Relations Board from taking any further steps or proceedings in the case of *In the Matter of Republic Steel Corporation—Case No. C-184* and directing the Board to file in the said court a certified transcript of the record of the proceedings before the Board in the said case.

2. That a writ of prohibition be issued out of this honorable Court prohibiting the Honorable Joseph Buffington, the Honorable J. Warren Davis, the Honorable J. Whitaker Thompson, Circuit Judges of the Third Judicial Circuit, and the other judges and officers of the United States Circuit Court of Appeals for the Third Circuit, from exer-

cising any jurisdiction upon the petition of the Republic Steel Corporation to set aside the order of April 8, 1938, entered by the National Labor Relations Board in the case of *In the Matter of Republic Steel Corporation—Case No. C–184* without affording the Board a reasonable opportunity to vacate its said order.

3. That pending further order of the Court herein, the Honorable Joseph Buffington, the Honorable J. Warren Davis, the Honorable J. Whitaker Thompson, Circuit Judges of the Third Judicial Circuit, and the other judges and officers of the United States Circuit Court of Appeals for the Third Circuit, be stayed or restrained from enforcing the provision of the order of the said court of May 13, 1938, directing the National Labor Relations Board forthwith to file in the court a certified transcript of the record before the Board in the case of *In the Matter of Republic Steel Corporation—Case No. C–184.*

4. That the Court grant to the National Labor Relations Board such other and further relief as may be just in the premises.

ROBERT H. JACKSON,
Solicitor General of the United States.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

MAY 1938.

CHARLES FAHY, being duly sworn, deposes that he is of counsel for the petitioner; that he has read the foregoing petition and that to the best of his information and belief the facts therein stated are true.

CHARLES FAHY.

Sworn to before me this Thirteenth Day of May, 1938.

W. MARVIN SMITH,
Notary Public.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MARCH TERM, 1938

No. 6764

REPUBLIC STEEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

RULE TO SHOW CAUSE WHY TRANSCRIPT OF RECORD CERTIFIED BY THE BOARD SHOULD NOT BE FILED AND DECREE AWARDING INJUNCTION UNTIL THE RETURN DAY OF SAID RULE

AND NOW, to wit, this 3d day of May 1938, it appearing that the petitioner filed on April 18, 1938, a petition for review of the National Labor Relations Board's order in the above proceeding, and at that time requested of the Board a transcript of the entire Record in the proceeding certified by the Board and including the pleadings and testimony upon which the order complained of was entered and the findings and the order of the Board be likewise filed in this Court, and the said Board in a letter dated April 18, 1938, from its General Counsel wrote as follows:

> I have your letter of April 18, and received today a copy of your petition for re-

view of the Board's order, filed in the Third Circuit. We will proceed to get up the record as promptly as possible for certification to the Court.

And it further appearing that in the Brief of the respondent filed in connection with the argument, on petitioner's application for a stay of the order that the respondent, National Labor Relations Board, has raised the question of the jurisdiction of this Court because of the transcript, certified, not being filed; and it further appearing that at said hearing counsel for the respondent stated that the transcript properly certified would be filed within ten days; and it further appearing at the time of said hearing that counsel for the National Labor Relations Board stated that the Board was seriously considering withdrawing, modifying or changing its order entered in the case and reopening same; and it further appearing that irreparable damage may be caused to the petitioner.

Upon motion of Joseph W. Henderson, Esquire, attorney for the petitioner, the Court grants a rule on the National Labor Relations Board to show cause within ten days why it should not file in this Court a transcript of the entire Record in the proceeding certified by the Board and including the pleadings and testimony upon which the order complained of was entered and the findings and order of the Board, said rule being returnable on May 13, 1938, at 2 o'clock P. M., D. S. T., at Philadelphia, Pennsylvania, and it is hereby

ORDERED, ADJUDGED and DECREED that until the return day of the said rule, the National Labor Relations Board be and the same hereby is re-

strained from taking any steps or proceedings whatsoever in this case.

BY THE COURT.

BUFFINGTON, *C. J.*

Received & Filed May 3, 1938.

WM. P. ROWLAND, *Clerk.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Rule to Show Cause Why Transcript of Record Certified by the Board Should Not be Filed and Decree Awarding Injunction Until the Return Day of Said Rule, in the case of Republic Steel Corp., Petitioner, versus National Labor Relations Board, Respondent, No. 6764, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 3d day of May in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundred and sixty-second.

[SEAL] (Sgd.) WM. P. ROWLAND,
Clerk of the U. S. Circuit Court
of Appeals, Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MARCH TERM, 1938

No. 6764

REPUBLIC STEEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

AND NOW, to wit, this 13th day of May, 1938, after argument upon the Rule of the petitioner to show cause why the transcript of the entire record certified by the National Labor Relations Board should not be filed in this Court, and it appearing that irreparable damage may be caused to the petitioner pending the determination of said Rule,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the aforesaid rule is made absolute, and the National Labor Relations Board be and is hereby restrained from taking any other steps or proceeding in this case until the said record is filed in this Court.

PER CURIAM.

BUFFINGTON, *Circuit Judge.*

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In the Supreme Court of the United States

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IN THE MATTER OF THE PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR A WRIT OF PROHIBITION AND FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE JOSEPH BUFFINGTON, THE HONORABLE J. WARREN DAVIS, AND THE HONORABLE J. WHITAKER THOMPSON, CIRCUIT JUDGES OF THE THIRD JUDICIAL CIRCUIT, AND THE OTHER JUDGES AND OFFICERS OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The single question presented by the return to the rule to show cause is whether the United States Circuit Court of Appeals for the Third Circuit has jurisdiction to prevent the National Labor Relations Board from exercising the power expressly conferred upon it by Section 10 (d) of the National Labor Relations Act (Act of July 5, 1935, c. 372,

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49 Stat. 449, 29 U. S. C. Supp. II, Sec. 151 *et seq.*). Section 10 (d) provides:

> Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

The petition herein shows that the Board has duly given appropriate and timely notice of its intention to vacate its order of April 8, 1938, against the Republic Steel Corporation (*In the Matter of Republic Steel Corporation*—Case No. C–184). By its temporary restraining order of May 3, 1938, the United States Circuit Court of Appeals for the Third Circuit prevented the Board from carrying out this intention. By the order of May 13, 1938, this restraint was made permanent. If the further order of the court to the Board to file forthwith in that court a certified transcript of the record of the proceedings against the Republic Steel Corporation be complied with, the Board will finally be deprived, independently of the restraining order, of the express authority conferred upon it by Section 10 (d). If, as the Board considers, the power conferred upon the Board by the Congress cannot be taken away by a court, clearly the Circuit Court of Appeals is without jurisdiction to restrain the Board from exercising that power or,

while maintaining in force that unlawful restraint, finally to deprive the Board of that power by compelling it to file a transcript of record in the proceeding.

The substance of the position set forth in the response to the rule to show cause is that Section 10 (d) of the Act is applicable only in cases which the Board has initiated by petitioning for an enforcement order; that the power conferred upon the Board by that section cannot be exercised in any case in which a petition has been filed against the Board pursuant to Section 10 (f) of the Act. This position is manifestly without foundation in the terms of the Act. The power granted by Section 10 (d) may be exercised at any time "until a transcript of the record in a case shall have been filed in a court, as hereinafter provided * * *" Section 10 (f), no less than Section 10 (e), is one of the provisions thereinafter made for the filing of a record in a case.

It is suggested that the need of avoiding "potential injustice" warrants the reading into the statute of a limitation which is not there. Since the supposed need of avoiding injustice is illusory, there is no occasion to consider whether the construction suggested would be permissible if the need were real. The respondents' entire position rests upon the assumption that if the present petition be granted, it follows that the Board may, "after making a final order against an aggrieved corporation * * *, delay indefinitely the filing of the

transcript of its proceedings," and so through the mere pendency of an unenforced "order" destroy "the morale of employees and the credit of their employer" (p. 3). The Board has never asserted that it may delay indefinitely the filing of the record, either under Section 10 (e) or 10 (f). It may be assumed that the Board has a statutory duty to file the record with all reasonable promptness, unless it has vacated or given notice of its intention forthwith to vacate the order, and that this duty can be enforced by the court in which the petition is pending. The admitted averments of the petition, however, show that no such question is here presented. The very result of the action of the Board in exercising its power under Section 10 (d), moreover, will be to relieve the respondent corporation of the force of the order from which the Circuit Court of Appeals conceives it to be in need of protection. Jurisdiction to require the Board to file the record when it has been guilty of unreasonable delay is not the equivalent of jurisdiction to prohibit the Board from exercising its statutory powers, and while so doing to compel the Board to perform an act which will finally terminate the power. Under the parallel provisions of both Section 10 (e) and Section 10 (f), "exclusive jurisdiction" (assuming for present purposes that this phrase means jurisdiction exclusive of the Board as well as of other courts) does not vest in the cir-

cuit court of appeals until a transcript of the record in the case has been filed.[1]

The orderly administration of law will be promoted, not prevented, if Section 10 (d) of the Act be given its natural meaning. That provision discloses unmistakably the purpose of Congress to facilitate the avoidance of needless litigation. To that end the Act confers upon the Board express power not only to correct errors recognized to be such, but also to modify or reverse action claimed to be erroneous where the gain to the public interest

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[1] *Douglas Aircraft Company, Inc.* v. *National Labor Relations Board*, decided May 11, 1938 (C. C. A. 9th). In *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 83 F. (2d) 731, the Circuit Court of Appeals for the Second Circuit, disposing of a question of conflicting jurisdiction with another circuit court of appeals, said (p. 733):

"However, the statute does not confer jurisdiction upon the mere filing of a petition; three things are necessary, a petition, a transcript of 'the entire record,' a notice mailed by the clerk to the respondent. Section 10 (e) of the act (29 U. S. C. A. § 160 (e)) very plainly declares that all these must concur; the court '*thereupon* shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper.' We can take no step of any sort until all this has been done. Section 10 (f) imposes the same conditions upon the respondent's appeal from an order. He must file a petition, serve a notice on the Board, 'and thereupon * * * a transcript * * *. Upon such filing, the court shall proceed in the same manner as in the case of an application * * * under subsection (e), and shall have the same exclusive jurisdiction.'"

in adhering to the action is outweighed by the injury to that interest entailed in extensive litigation over its validity. The wisdom of the Congressional policy is pointedly illustrated by the proceedings which gave rise to the present petition, in which the respondent corporation seeks to compel the Board to engage in litigation concerning an alleged denial of rights which, as soon as they were asserted, the Board expressed its willingness to accord. No good purpose can be served by burdening the dockets of the courts, or delaying the effectuation of the purposes of the Act, with such futile and unnecessary controversy.

Petitioner submits that the Circuit Court of Appeals is without jurisdiction to restrain the Board from exercising its express power under Section 10 (d) of the Act, or, while subjecting it to such unlawful restraint, to compel the Board to perform an act which would terminate its power under that section; that no cause has been shown why relief should not be granted to petitioner as prayed; and that the writs of mandamus and prohibition should accordingly issue.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

ROBERT B. WATTS,
Acting General Counsel,
National Labor Relations Board.

MAY 1938.

APPENDIX

Section 10 (d), (e), (f), of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. II, Sec. 151 *et seq.*) provides as follows:

> (d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.
>
> (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and

of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme

Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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